(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

Supreme Court of the United States

DONALD RAPIER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMENDED PETITION FOR WRIT OF CERTIORARI

DONALD RAPIER
Petitioner Pro Se
88096-079
P.O. Box 1000
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66-pp

QUESTION PRESENTED FOR REVIEW

1.) Whether Petitioner Rapier's convictions under 18 U.S.C. § 2252A(a)(1) and 18 U.S.C. § 2256 (Interstate or foreign transportation of child pornography) (Count 1); 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256 (Possession of child pornography) are unconstitutional where the indictment specifically defined child pornography as material that "appears to be of a minor" and/or "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

2.) Whether the mandatory minimum sentence received by Petitioner Rapier under 18 U.S.C. § 2252A(b) was violative of this Court's decision in *Apprendi v. New Jersey*, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00)

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

More specifically, the Petitioner Donald Rapier and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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OPINIONS BELOW

The 1-24-02 opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 2002 U.S. App. LEXIS 3816, and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Southern District Of Texas, entered on 6-6-00, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The indictment for this case is reprinted in the separate Appendix C to this Petition.

The docket sheets for the United States District Court for the Southern District Of Texas are reprinted in the separate Appendix D to this Petition.

The docket sheets for the United States Court of Appeals for the Fifth Circuit are reprinted in the separate Appendix E to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 1-24-02. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law ... abridging the freedom of speech ... *Id.*

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

18 U.S.C. § 2252A provides:

> § 2252A. Certain activities relating to material constituting or containing child pornography
>
> (a) Any person who--
> (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;
> (2) knowingly receives or distributes--
> (A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or
> (B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;
> (3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;
> (4) either--
> (A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the

United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer,

shall be punished as provided in subsection (b).

(b) (1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., 2241 et seq., or 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., 2241 et seq., or 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

(c) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that--

(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

(2) each such person was an adult at the time the material was produced; and

(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

(d) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

HISTORY:

(Added Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 3(a)], 110 Stat. 3009-28; Oct 30, 1998, P.L. 105-314, Title II, §§ 202(b), 203(b), 112 Stat. 2978.). *Id.*

18 U.S.C. § 2256 provides:

§ 2256. Definitions for chapter

For the purposes of this chapter [18 USCS §§ 2251 et seq.], the term--

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated--

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or

produced by electronic, mechanical, or other means, of sexually explicit conduct, where--

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and

(9) "identifiable minor"--

(A) means a person--

(i)

(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

HISTORY:

(Added Feb. 6, 1978, P.L. 95-225, § 2(a), 92 Stat. 8; May 21, 1984, P.L. 98-292, § 5, 98

Stat. 205; Oct. 18, 1986, P.L. 99-500, Title I, § 101(b), 100 Stat. 1783-74; Oct. 30, 1986, P.L. 99-591, Title I, § 101(b), 100 Stat. 3341-74; Nov. 7, 1986, P.L. 99-628, § 4, 100 Stat. 3510; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle N, Ch 1, §§ 7511(c), 7512(b), 102 Stat. 4485, 4486.)

(As amended Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 2)], 110 Stat. 3009-27.). *Id.*

STATEMENT OF THE CASE

Donald Rapier was charged with violation of 18 U.S.C. § 2252A(a)(1) and 18 U.S.C. § 2256 (Interstate or foreign transportation of child pornography) (Count 1); 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256 (Possession of child pornography) (Count 2).

These charges arose from the "recovery" of 17 images from Petitioner Rapier's laptop computer when he was returning from a trip outside the United States. The images had been deleted and, prior to deletion, had been "computer generated" images which had not been made utilizing actual children.

The indictment specifically invoked the definitions of 18 U.S.C. § 2256 which criminalize material that "appears to be of a minor" and/or "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. (Appendix C, Exhibit C2)

Notably, the Indictment failed to allege that Petitioner Rapier had a prior conviction which would invoke a 5 year mandatory minimum under 18 U.S.C. § 2252A(b)(1). *Id.*

Mr. Rapier subsequently pleaded guilty to these charges. Prior to sentencing, the District Court realized that it had erred by failing to advise Mr. Rapier of the 5 year mandatory minimum the Court was going to invoke as a result of his prior conviction. The prior 'conviction' was actually a "deferred adjudication" which never resulted in a "conviction". The Court offered to allow Mr. Rapier to withdraw his plea. Apparently on advice of counsel, Mr. Rapier went ahead with his plea of guilty, in spite of the fact that he wouldn't have received any additional sentence if he proceeded to trial and lost.[1]

---

[1] His "Total Offense Level" after the plea of guilty was 18. This included 3 levels downward adjustment for "acceptance of responsibility" as a result of the plea. With a Criminal History of "I", the guideline sentencing range was 27-33 months which was 'trumped' by the 60 months statutory mandatory minimum. Had he proceeded to trial, he'd have lost the

On 5-26-00, Mr. Rapier was sentenced to serve 60 months incarceration plus 3 years supervised release. This sentence represented the statutory mandatory minimum after enhancement under 18 U.S.C. § 2252A(b)(1). Counsel filed a direct appeal. The Court of Appeals denied his appeal on 1-24-02.

Mr. Rapier demonstrates within that the United States court of appeals for the Fifth Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.

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acceptance of responsibility but this would have only resulted in a guideline sentencing range of 37-46 months and would have allowed him the possibility of striking a better deal with the government and/or even possibly of being found not guilty.

REASONS FOR GRANTING THE WRIT

1.) THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > **... (c)** a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court... *Id.*

Supreme Court Rule 10(c).

1A.) The Child Pornography Prevention Act Of 1996 ("CPPA") Was Unconstitutionally "Vague" And "Overbroad" Due To The Inclusion Of The Phrases "Appears To Be" A Minor, And "Conveys The Impression" That The Depiction Portrays A Minor In The "Definitions" Section Of The Statute, 18 U.S.C. § 2256.

In *Ashcroft v. Free Speech Coalition*, 2002 U.S. LEXIS 2789 (4-16-02)[2], this Court held that the Child Pornography Prevention Act of 1996 ("CPPA") was unconstitutionally "vague" and "overbroad" due to the inclusion of the phrases "appears to be" a minor, and "conveys the impression" that the depiction portrays a minor in the "definitions" section of the statute, 18 U.S.C. § 2256. These phrases and definition apply to the entire Chapter 110 of the Code which covers crimes under sections 18 U.S.C. § 2251 thru 18 U.S.C. § 2260.

Since Petitioner Rapier's indictment specifically invoked the definitions of 18 U.S.C. § 2256 which criminalize material that "appears to be of a minor" and/or "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually- explicit conduct, his indictment falls four-square within the statute

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[2] In Mr. Rapier's original petition for Writ of Certiorari, *Free Speech Coalition v. Reno*, 198 F.3d 1083; 1999 U.S. App. LEXIS 32704 (9th Cir. 12-17-99) had been granted certiorari *sub nom Holder v. Free Speech Coalition*, 531 U.S. 1124; 121 S. Ct. 876; 148 L. Ed. 2d 788; 2001 U.S. LEXIS 944 (1-22-01) and was presently before this Court sub nom *Ashcroft v. Free Speech Coalition*, No. 00-795, where briefing had been concluded and oral argument was held on 10-30-01, but no ruling had been handed down. Mr. Rapier had cited to the foregoing cases in his original petition. The Clerk ordered Mr. Rapier to amend the original petition before filing. This is the amended petition and *Ashcroft v. Free Speech Coalition*, 2002 U.S. LEXIS 2789 (4-16-02) has now been decided. To save another round of paperwork, Mr. Rapier is citing to *Ashcroft v. Free Speech Coalition*, 2002 U.S. LEXIS 2789 (4-16-02) in this amended petition.

which the Ninth Circuit found unconstitutional. (Appendix, Exhibits C) While he pleaded guilty, it is well settled law that an indictment's failure to charge an offense constitutes a jurisdictional defect which may be challenged in spite of such a plea. *United States v. Cabrera-Teran,* 168 F.3d 141; 1999 U.S. App. LEXIS 2222 (5th Cir. 1999).

Based on the foregoing facts and law, Petitioner Rapier's conviction and sentence are unconstitutional under *Ashcroft v. Free Speech Coalition,* 2002 U.S. LEXIS 2789 (4-16-02).

1B.) The Application Of The 5 Year Mandatory Minimum Of 18 U.S.C. § 2252A(b) To Petitioner Rapier Was Unconstitutional Because It Was Based On Facts Not Pleaded In Indictment.

In *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348, 2000 U.S. LEXIS 4304 (6-26-00), this Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.

While *Apprendi* made an exception from it's rule for enhancement of a statutory maximum sentence based on prior convictions by stating that the Court did not overrule *Almendarez-Torres v. United States*, 523 U.S. 224, 231-234, 242-246, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998), this Court intimated that *Almendarez Torres* may have been wrongly decided. *Apprendi*, 530 U.S. at 488. To the extent that this Court would reconsider *Almendarez Torres*, Petitioner Rapier's case would provide an exceptional opportunity for such review. This is especially true in light of the fact that the conviction which was used to enhance his sentence wasn't a "conviction" at all; it was instead a "deferred adjudication" under Texas law which the State of Texas does not allow to be used for enhancements. *Scott v. Texas*, 55 S.W.3d 593; 2001 Tex. Crim. App. LEXIS 66 (Texas 9-12-01).

Moreover, the Court is presently reviewing whether *Apprendi* is applicable to enhancement of a "mandatory minimum" sentence. *Harris v. United States*, No. 00-10666; 122 S. Ct. 663; 151 L. Ed. 2d 578; 2001 U.S. LEXIS 10961 (12-10-01). Should this Court uphold the numerous lower courts that have held that *Apprendi* is applicable to

"mandatory minimum" sentences,[3] Petitioner Rapier's case should be entitled to benefit from this Court's decision.

As set forth above, this case presents several opportunities for this Court to resolve important questions in a case which can be broadly applied in the courts below. This is a further and important consideration which strongly militates for grant of certiorari. *Vasquez v. United States*, 454 U.S. 975, 70 L.Ed.2d 396, 102 S.Ct. 528 (1981).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Fifth Circuit in Mr. Rapier's case.

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[3] See *United States v. Guevara*, 2001 U.S. App. LEXIS 26835 (2nd Cir. 12-18-01) and *United States v. Ramirez*, 242 F.3d 348; 2001 U.S. App. LEXIS 2325 (6th Cir. 2-16-01) and *Gibson v. United States*, 271 F.3d 247; 2001 U.S. App. LEXIS 23897 (6th Cir. 11-6-01) and *Parise v. United States*, 117 F. Supp. 2d 204; 2000 U.S. Dist. LEXIS 16248 (D. Ct. 10-25-00) and *United States v. Velasco-Heredia*, 2001 U.S. App. LEXIS 8732 (9th Cir. 5-10-01) and *United States v. Longoria*, 2001 U.S. App. LEXIS 16003 (5th Cir. 7-19-01).

CONCLUSION

For all of the foregoing reasons, Petitioner Donald Rapier respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the denial of his Request for Certificate of Appealability and **REMAND**[4] to the court of appeals for reconsideration in light of this Court's decisions in *Ashcroft v. Free Speech Coalition*, 2002 U.S. LEXIS 2789 (4-16-02) and/or *Harris v. United States*, No. 00-10666.

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[4] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

No.

Supreme Court of the United States

DONALD RAPIER,

Petitioner,

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED 1-24-02

2002 U.S. App. LEXIS 3816, *
USA v. Rapier
00-20514
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
2002 U.S. App. LEXIS 3816
January 24, 2002, Decided
NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION
PRIOR HISTORY: United States District Court for the Southern District of Texas. H-00-CR-76-ALL.
OPINION: Affirmed

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT U. S. COURT OF APPEALS
FILED JAN 24 2002
CHARLES R. FULDRUGE CLERK
No. 00 20514
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff Appellee, versus DONALD DEE RAPIER,

Defendant Appellant.

Appeal from the United States District Court for the Southern District of Texas USDC No. H 00 CR 76 ALL Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges. PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Donald Dee Rapier appeals from his guilty plea conviction and sentence on one count of foreign or interstate transportation of child pornography and one count of possession of child pornography. Rapier first complains that the district court erred at his re arraignment by failing to admonish him that he faced a mandatory minimum sentence of imprisonment under 18 U.S.C. § 2252A(b) as a result of his prior conviction for indecency with a child under Texas state law. The district judge did err. However, prior to imposing sentence the district judge put Rapier on notice of the mandatory minimum sentence and gave Rapier the opportunity to withdraw his guilty plea. Rapier declined to do so. Because the district court complied with FED. R. CRIM. P. 11 prior to entering judgment and coupled its compliance

with provision of an opportunity to withdraw the guilty plea, the error made at re arraignment was rendered harmless. See *United States v. Johnson*, 1 F.3d 296, 303 04 (5th Cir. 1993) (en banc) (error was harmless where failure of judge to advise defendant of his mandatory minimum sentence could not have affected decision to plead guilty); see also *United States v. Gulledge*, 491 F.2d 679, 679 (5th Cir. 1974) (where district court failed to make a full determination of the factual basis prior to accepting guilty pleas, there was no reversible error where, prior to entering judgment, court complied with FED. R. CRIM. P. 11 and gave defendants an opportunity to withdraw their pleas).

Rapier next argues that his Texas sexual offense, which was disposed of through deferred adjudication, is not a "prior conviction" within the meaning of the enhancement provision. Rapier's argument fails under *United States v. Cisneros*, 112 F.3d 1272, 1280 82 (5th Cir. 1997) (defendant's Texas guilty plea that resulted in a deferred adjudication was a "prior conviction" for purposes of sentence enhancement provision).

Rapier next argues that after failing to admonish him of the minimum and maximum sentences to which he was exposed, the district court compromised his ability to later withdraw his guilty plea by ordering him to register as a sex offender with the State of Texas and to participate in a course for sexual offenders. The record does not reveal that the district court ordered either of these actions. Giving Rapier's pro se brief liberal construction, Rapier contends that he was obliged to take these actions following the entry of a guilty plea at his re arraignment in reliance on the district judge's incorrect admonishment. However, the record shows that Rapier's participation in a course for sexual offenders pre dated his guilty plea, and given evidentiary rules precluding the admission of evidence of a withdrawn plea of guilty, see FED. R. Evid. 410; FED. R. CRIM. P. 11 (e) (6) , Rapier

cannot demonstrate that his ability to withdraw his guilty plea and proceed to trial was compromised due to error below.

Rapier also argues that the Government provided inadequate notice of its intention to seek enhancement of his sentence prior to entry of his original guilty plea. There is no statutory provision mandating that the Government give notice of its intention to seek an enhanced sentence under 18 U.S.C. 9 2252A(b). Further, in crimes involving the sexual exploitation of children, this court is bound to enforce a mandatory minimum sentence prescribed for a second conviction, even where the Government does not seek the enhanced penalty. See *United States v. Schmeltzer*, 960 F.2d 405, 408 09 (5th Cir. 1992) (vacating sentence as inconsistent with the minimum sentence prescribed for a second conviction under 18 U.S.C. § 2252(a)(2),(b)(2)).

Rapier also complains that he received ineffective assistance of counsel. This court does not review ineffective assistance of counsel claims on direct appeal except in the rare case where the record permits a fair evaluation of the merits of the claim. See *United States v. Crooks*, 83 F.3d 103, 1o8 (5th Cir. 1996). Rapier's ineffective assistance of counsel claims were not presented to the district court. The record is therefore insufficient to permit evaluation of the claim at this time. See *United States v. Navelar*, 963 F.2d 732, 735 (5th Cir. 1992).

The judgment of the district court is AFFIRMED.

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED 6-6-00

ENTERED JUNE 06, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in Houston
JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA,
v.
DONALD DEE RAPIER

[] See Additional Aliases Sheet

Case Number: 4:00CR00076-001
Defendant's Attorney: Jay T. Karahan

THE DEFENDANT:
[x] pleaded guilty to count(s) 1 and 2 on March 6,2000.

[] pleaded nolo contendere to count(s)_____ which was accepted by the court.
[] was found guilty on count(s)_____ after a plea of not guilty.

Title & Section: 18 U.S.C. §2252A(a)(1) and §2256
Nature of Offense: interstate or foreign transportation of child pornography
Date Offense Concluded: 07/04/1999
Count Number(s): 1
Title & Section: 18 U.S.C. §2252A(a)(5)(B) and §2256
Nature of Offense: Possession of child pornography
Date Offense Concluded: 07/04/1999
Count Number(s): 2

[] See Additional Counts of Conviction Sheet

The defendant is sentenced as provided in pages 2 through 6 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)_____

[] Count(s)_____dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

Defendant's Social Security No.: 440-44-5345
Defendant's Date of Birth: 02/22/1946
Date of imposition of Judgement: May 26, 2000
Defendant's USM No.: 88096-079
Defendant's Residence Address: 8787 Woodway, #1305, Houston, TX 77063.
Defendant's Mailing Address: 8787 Woodway, #1305, Houston, TX 77063.

Signature of Judicial Officer
/SS/_____.
Name and Title of Judicial Officer:
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE
Date: June 2, 2000

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 60 month(s).

The term consists of SIXTY (60) MONTHS on each of Counts 1 and 2 to run concurrently.

[] See Additional Imprisonment Terms Sheet
[x] The Court makes the following recommendations to the Bureau of Prisons: That the defendant be incarcerated at the federal institution located at Burner, North Carolina.
[] The defendant is remanded to the custody of the United States Marshal.
[] The defendant shall surrender to the United States Marshal for this district

[] _____ on _____
[] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[] by2 p.m. on _____
[x] as notified by the United States Marshal.
[] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATESMARSHAL

By

_____
Deputy U S Marshal

SUPERVISED RELEASE

B 4

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).
The term consists of THREE (3) YEARS as to each of Counts 1 and 2, to run concurrently.
[] See Additional Supervised Release Terms Sheet
The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.
For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.
[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)
[x] The defendant shall not possess a firearm as defined in 18 U.S.C.§ 921. (Check, if applicable)
If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION
[x] See Special Conditions of Supervision Sheet 3.01

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shah report to the probation officer and shall submit a truthful and complete wrr['ten report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or

characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U S.C. § 2248, 2259 2264. 2327. 3663 3663A, and/or 3664 The defendant shall also pay the assessment imposed m accordance with Title 18 US.C. § 3013;

15) the defendant shall notify the U.S. Probation Office of any maternal change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

The defendant is required to provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from Incurring new credit charges or opening additional lines of credit without approval of the probation officer, unless the defendant is in compliance with the fine or restitution payment schedule.

The defendant is required to participate in a mental health program as deemed necessary and approved, by the probation officer. The defendant will incur costs associated with such programs, based on ability to pay as determined by the probation officer.

The defendant shall register with the sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, as directed by the probation officer. The probation officer will provide the state officials with any and all information required by the state sex offender registration agency and may direct the defendant to report to that agency personally for additional processing, such as photographing and fingerprinting.

The defendant shall not possess a computer or obtain access to any computer system outside of that required for employment. Should he have access to a computer for employment, he is prohibited from accessing or using the Internet during his term of supervision. If the defendant requires the use of the Internet, the probation officer to assess request for Internet usage. Also, the defendant shall grant to the probation officer access to any computer used by the defendant to ensure compliance with the conditions of his supervision.

The defendant shall not possess any type of pornography unless approved by a physician.

The defendant Js required to participate in a sex offender treatment program as deemed necessary and approved by the probation officer. The defendant will incur costs associated with such program, based upon ability to pay as determined by the probation officer.

The defendant shall not have contact with children less than 18 years of age without adult supervision.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5. Part B.

Assessment: $200.00
Fine: $6,000.00
Restitution:

A $100 special assessment is ordered for each count, for a total of $200.

[] if applicable, restitution amount ordered pursuant to plea agreement.

[] See Additional Terms for Criminal Monetary Penalties Sheet.

FINE

[] The above fine includes costs of incarceration and/or supervision in the amount of $0.00 .

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612 (f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612 (g).

[] The Court determined that the defendant does not have the ability to pay interest and it is ordered that.

[] The interest requirement is waived

[] The interest requirement is modified as follows

RESTITUTION

[] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals: $0.00		$0.00	

[] See Additional Victims

SCHEDULE OF PAYMENTS

Payments shall be applied ;n the following order: (1) assessment: (2) restitution: (3) fine principal: (4) cost of 3secution: (5) interest: (6) penalties.
Payment of total fine and other criminal monetary penalties shall be due as follows:
1) [] in full immediately: or
2) [x] $6,200.00 immediately, balance due (in accordance with C, D, or E); or
3) [] not later than _____; or
4) [] in installments to commence 30 day(s) after the date of this judgment.

In the event the entire amount of criminal monetary penalties imposed is not

paid prior to the commencement of supervision, the U.S. probation officer

shall pursue collection of the amount due, and shall request the court to

establish a payment schedule if appropriate; or
5) [] in _____ (e.g. equal, weekly, monthly, quarterly) installments of ____

over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.
Special instructions regarding the payment of criminal monetary penalties:
Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208.
[] Joint and Several
[] See Additional Joint $ Several Defendants
[] The defendant shall pay the cost of prosecution.
[] The defendant shall pay the following court cost(s):
[] The defendant shall forfeit the defendant's interest in the following property to the United States:
[] See Additional Forfeited Property Sheet

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[x] The Court adopts the factual findings and guideline application in the presentence report.

OR

[]The Court adopts the factual findings and guideline application in the presentence report except:

[] See Additional Findings and Guideline Application Exceptions Sheet

Guideline Range Determined by the Court:

Total Offense Level: 18

Criminal History Category: 1

Imprisonment Range: 27 to 33 months.

Supervised Release Range: 3 to 5 years.

Fine Range: $6,000.00 to $60,000.00

[] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

[] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 1DgA, 110, 110A, 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment

of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of

[] Partial or no restitution is ordered for the following reason(s):

[] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines

OR

[] The sentence is within the guideline, range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

[] See Additional Reasons for Point Within Range Sheet

OR

[x] The sentence departs from the guideline range:

[] upon motion of the government, as a result of defendant's substantial assistance.

[x] for the following specific reason(s):

Due to enhancement provisions pursuant to 18 USC. § 2252A(b)(1) and (b)(2).

[] See Additional Reasons for Departure From The Guideline Range Sheet

APPENDIX C

INDICTMENT
DATED 2-14-00

FILED: 2-14-00
MICHAEL M. MILBY,
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
CRIMINAL No. H-00-76

UNITED STATES OF AMERICA	§
V.	§
DONALD DEE RAPIER	§
a/k/a DONALD D. RAPIER	§

INDICTMENT

THE GRAND JURY CHARGES THAT:

INTRODUCTION

At all times material to Counts One and Two of this Indictment:

1. The term "minor" is defined, pursuant to Title 18, United States Code, Section 2256(l), as "any person under the age of eighteen years."

2. The term "sexually explicit conduct" is defined, pursuant to Title 18, United States Code, Section 2256(2), as any:

> actual or simulated -
> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; [or]
> (B) bestiality; [or]
> (C) masturbation; [or]
> (D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person.

3. The term "visual depiction" is defined, pursuant to Title 18, United States Code, Section 2256(5), as any:

> "undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;"

The term "computer" is defined, pursuant to Title 18, United States Code, Sections 2256(6) and 1030(e)(1), as any:

> "electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or [data] storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;-

5. The term "child pornography" is defined, pursuant to Title 18, United States Code, Section 2256(8), as any:

"any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where -

> (A) the production of such visual depiction involves the use of a minor engaged in sexually explicit conduct;
> (B) such visual depiction is, or appears to be of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging -in sexually explicit conduct;"

COUNT ONE

[18 U.S.C. §§ 2252A(a)(l) and 2256]

1. Paragraphs 1 through 5 of the Introduction to this Indictment are incorporated herein by reference as though fully set forth herein.

2. On or about July 4, 1999, within the Houston Division of the Southern District of Texas,

DONALD DEE RAPIER,

defendant herein, did knowingly transport in interstate and foreign commerce by any means, including by computer, child pornography.

In violation of Title 18, United States Code, Sections 2252A(a)(1) and 2256.

COUNT TWO

[18 U.S.C. §§ 2252A(a)(5)(B) and 2256]

1. Paragraphs 1 through 5 of the Introduction to this Indictment are, incorporated herein by reference as though fully set forth herein.

2. On or about July 4, 1999, within the Houston Division of the Southern District of Texas,

DONALD DEE RAPIER,

defendant herein, did knowingly possess a computer and other material that contained an image of child pornography-

that had been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer; and which was produced using materials that have been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer.

In violation of Title 18, United States Code, Sections 2252A(a)(5)(B) and 2256.

A-TRUE BILL:

/SS/ _____.

FOREPERSON OF THE GRAND JURY

MERVYN M. MOSBACKER
United States Attorney

/SS/ _____.

By: DANIEL C. RODRIGUEZ
Assistant United States Attorney
(713) 567-9350

APPENDIX D

DOCKET SHEETS
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Docket as of October 2, 2001 7:06 pm Web PACER (v2.3-TXSD)

U.S. District Court
TXS - Southern District of Texas (Houston)

CRIMINAL DOCKET FOR CASE #: 00-CR-76-ALL

USA v. Rapier

Filed: 02/14/00
Dkt# in other court: None

Case Assigned to: Judge Nancy F. Atlas

DONALD DEE RAPIER (1)
aka
Donald D Rapier
defendant

Jay Ted Karahan
[term 05/26/00
713-622-8777 fax
[COR LD NTC ret]
[term 05/26/00]
Kuniansky Karahan
et al
5051 Westheimer
Ste 700
Houston, TX 77056
713-622-8333
Donald Dee Rapier
[term 05/26/00]
8787 Woodway, #1305
Houston, TX 77081

Pending Counts:
18:2252A. F Interstate or foreign transportation of child pornography MAX PENALTY: 15 yrs and/or $250, 000(1)

Disposition
Cnts l&2 60 mos CBOP, to run concurrent 3yrs SRT to run concurrent; $200 SA; Deft. must participate in a mental health program f/sex offenders, Deft. shall not have centact w/children under the age of 18, $6,000 fine on counts 1 & 2 to run concurrent. Court recommends that deft. be placed in the Butner facility.
(1)
Pending Counts:
18:2252A. F Possession of child pornography MAX PENALTY: 5 yrs and/er $250,000
(2)
Disposition
Cnts l&2 60 mos CBOP, to run concurrent 3yrs SRT to run concurrent; $200 SA; Deft. must participate in a mental health program f/sex offenders, Deft. shall not have centact w/children under the age of 18, $6,000 fine on counts 1 & 2 to run concurrent. Court recommends that deft. be placed in the Butner facility.
(2)

Offense Level (opening): 4
Terminated Counts:
NONE
Complaints:
NONE
U. S. Attorneys:
Daniel Rodriguez
713-718-3300
[COR LD NTC]
US Attorneys Office
PO Box 61129
Houston, TX 77208
713-567-9350
U S Marshal - H
FTS n

713-718-4848
[NTC ret]
515 Rusk
10th Floor
Houston, TX 77002
713-718-4800
U S Probation - H
FTS n
INS_prob1
[NTC ret]
515 Rusk
2nd Floor
Houston, TX 77002
713-250-5266
Pretrial Services - H
FTS n
713-250-5666
[NTC ret]
515 Rusk
6th Floor
Houston, TX 77002
713-250-5218

DOCKET PROCEEDINGS

2/14/00 1 INDICTMENT as to Donald Dee Rapier (1) count(s) 1, 2 ,filed. (pg) [Entry date 02/16/00] [Edit date 09/25/01]

2/14/00 2 AO 257 Information Sheet as to Donald Dee Rapier , filed. (pg) [Entry date 02/16/00] [Edit date 09/25/01]

2/14/00 3 ORDER for Issuance of Summons as to Donald Dee Rapier (Signed by Magistrate Judge

Calvin Botley), entered. (pg) [Entry date 02/16/00] [Edit date 09/25/01]

2/14/00 -- SUMMONS issued for Donald Dee Rapier to appear on 2/24/00, 10 a.m. for Initial Appearance First Appearance set for 10:00 2/24/00 for Donald Dee Rapier before Magistrate Judge Calvin Botley (pg) [Entry date 02/16/00] [Edit date 09/25/01]

2/23/00 11 SUMMONS issued 2/14/00 Returned Executed as to Donald Dee Rapier on 2/18/00 filed. (pg) [Entry date 03/06/00] [Edit date 09/25/01]

2/24/00 4 Arraignment as to Donald Dee Rapier held before Magistrate Judge Calvin Botley Ct Reporter: ERO (Defendant informed of rights.) , filed., Plea of Not Guilty: Donald Dee Rapier (1) count(s) 1, 2 App. Rodriguez f/govt and Karahan f/deft. Bond cont'd. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/24/00 5 WAIVER of Speedy Trial Limits by Donald Dee Rapier , filed. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/24/00 6 SCHEDULING ORDER as to Donald Dee Rapier setting Motion Filing deadline on 3/15/00; Motion Response deadline 3/25/00 Proposed Voir Dire and Jury Charges by 4/14/00; Pretrial Conference for 8:30 4/3/00; Jury Trial for 9:00 4/17/00 before Magistrate Judge Calvin Botley (Signed by Magistrate Judge Calvin Botley), entered. Parties ntfd. ETT: 3 days Waiver of Speedy Trial? YES (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/24/00 -- Receipt for surrender of Passport as to Donald Dee Rapier Passport # 158258485 U.S. , filed. (pg) [Entry date 03/26/00] [Edit date 09/25/01]

2/25/00 8 MOTION by Donald Dee Rapier to Travel to Troy Michigan from 2/27/00 to 3/3/00, filed. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/25/00 9 ORDER granting [8-1] motion to Travel to Troy Michigan from 2/27/00 to 3/3/00 as to Donald Dee Rapier (1) (Signed by Magistrate Judge Calvin Botley entered. Parties ntfd. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/28/00 7 NOTICE set Rearraignment for 3:00 3/6/00 for Donald Dee Rapier before Judge Nancy F. Atlas , filed. Parties ntfd. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/28/00 10 Surety BOND with Order Setting Conditions of Release entered by Donald Dee Rapier in Amount $ 50,000 with $2,500.00 cash deposit drawn on WElls Fargo Bank, Receipt # 6812008093, filed. (Signed by Magistrate Judge Calvin Botley) Bond Depositor: Ronald Raper, 6435 Ladera Drive, Houston, TX, 77083 (ks) [Entry date 02/29/00] [Edit date 09/25/01]

3/6/00 12 ORDER as to Donald Dee Rapier (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. Deft's second motion to travel outside the District is granted. (pg) [Entry date 03/08/00] [Edit date 09/25/01]

3/6/00 13 Re-Arraignment as to Donald Dee Rapier held before Judge Nancy F. Atlas Ct Reporter: none; filed. Plea of Guilty: Donald Dee Rapier (1) count(s) 1, 2. App. Rodriguez f/govt and Karahan f/deft. Sentencing 5/26/00 2:00. (ck) [Entry date 03/08/00] [Edit date 09/25/01]

3/6/00 14 ORDER for Disclosure of PSI as to Donald Dee Rapier , PSI completion by 4/18/00 for Donald Dee Rapier , Objection to PSI due 5/2/00 for Donald Dee Rapier , Final PSI due 5/22/00 for Donald Dee Rapier , Sentencing set for 2:00 5/26/00 for Donald Dee Rapier before Judge Nancy F. Atlas (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. (ck) [Entry date 03/08/00] [Edit date 09/25/01]

3/6/00 15 SECOND MOTION by Donald Dee Rapier to Travel outside the district, filed. (ck) [Entry date 03/09/00] [Edit date 09/25/01]

4/7/00 16 THIRD MOTION by Donald Dee Rapier to Travel outside district , filed. (br) [Entry date 04/11/00] [Edit date 09/25/01]

4/12/00 17 ORDER granting [16-1] motion to Travel outside district as to Donald Dee Rapier (1) (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. (ck) [Entry date 04/13/00] [Edit date 09/25/01]

5/8/00 18 STATEMENT of No Objections to Presentence Investigation Report by USA as to Donald Dee Rapier , filed. (pg) [Entry date 05/09/00] [Edit date 09/25/01]

5/8/00 19 MOTION by Donald Dee Rapier to Travel to Austin, Texas , filed. (pg) [Entry date 05/09/00] [Edit date 09/25/01]

5/10/00 20 ORDER granting [19-1] motion to Travel to Austin, Texas as to Donald Dee Rapier (1) (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. (br) [Entry date 05/11/00] [Edit date 09/25/01]

5/19/00 21 OBJECTION by Donald Dee Rapier to Presentence Investigation Report , filed. (br) [Entry date 05/22/00] [Edit date 09/25/01]

5/23/00 22 NOTICE of Sentence Enhancement by USA as to Donald Dee Rapier , filed. (br) [Entry date 05/24/00] [Edit date 09/25/01]

5/24/00 23 FINAL PRESENTENCE INVESTIGATION REPORT (Sealed) as to Donald Dee Rapier , filed. (pg) [Entry date 05/24/00] [Edit date 09/25/01]

5/24/00 24 SEALED Confidential Sentencing Recommendation regarding Donald Dee Rapier to the Court, filed and placed in vault. (pg) [Entry date 05/24/00] [Edit date 09/25/01]

5/25/00 25 OBJECTION by Donald Dee Rapier to Govt's Notice of Sentence Enhancement, filed. (br) [Entry date 05/25/00] [Edit date 09/25/01]

5/26/00 26 SENTENCING MEMORANDUM by Donald Dee Rapier , filed. (br) [Entry date 05/30/00] [Edit date 09/25/01]

5/26/00 27 Sentencing held before Judge Nancy F. Atlas; Ct Reporter: A. Traylor; Donald Dee Rapier (1) count(s) 1, 2 . Cnts 1&2 60 mos CBOP, to run concurrent 3yrs SRT to run concurrent; $200 SA; Deft. must participate in a mental health program f/sex offenders, Deft. shall not have contact w/children under the age of 18, $6,000 fine on counts 1 & 2 to run concurrent. Court recommends that deft. be placed in the Butner facility. , filed. US Probation Officer: L. Reed; App: J. Karahan f/deft; D. Rodriguez f/USA; Deft. cont's on bond. Deft's objections, Govt's Notice of Inhancement, deft's

objections to Govt's Notice of Inhancement, Deft's sentencing memorandum & addendum are all adoped as a part of this record. (br) [Entry date 06/02/00] [Edit date 09/25/01]

5/26/00 28 Notice of Right to Appeal as to Donald Dee Rapier (signed by Judge Nancy F. Atlas), filed. (br) [Entry date 06/02/00] [Edit date 09/25/01]

6/1/00 29 NOTICE OF APPEAL of sentencing by Donald Dee Rapier (1) count(s) 1, 2 FILING FEE $ Pd RECEIPT # 4500907 , filed. (bwd) [Entry date 06/02/00] [Edit date 09/25/01]

6/1/00 30 Transcript Order Form as to Donald Dee Rapier requesting transcript of sentencing before Judge Atlas on 5/26/00 by Ct Reporter: A Traylor , filed. (pg) [Entry date 06/05/00] [Edit date 09/25/01]

6/2/00 -- Notice of appeal and Copy of docket as to Donald Dee Rapier to USCA: [29-1] appeal . Parties ntfd. (bwd) [Entry date 06/02/00] [Edit date 09/25/01]

6/2/00 31 JUDGMENT as to Donald Dee Rapier (1) count(s) 1, 2 (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. (br) [Entry date 06/06/00] [Edit date 09/25/01]

6/12/00 32 Transcript Order Form as to Donald Dee Rapier requesting transcript of Rearraignment before Judge Atlas on 3/6/00 by Ct Reporter: Reed, filed. (ck) [Entry date 06/14/00] [Edit date 09/25/01]

6/15/00 33 ORDER to Surrender for Donald Dee Rapier on 6/30/00 at 2:00 at FCI Butner Butner, NC (Signed by Judge Nancy F. Atlas) , entered. Parties ntfd. (br) [Entry date 06/16/00] [Edit date 09/25/01]

7/10/00 34 Judgment Returned Executed as to Donald Dee Rapier ; on 6/30/00 to serve sentence at Butner, NC, filed. (br) [Entry date 07/11/00] [Edit date 09/25/01]

7/17/00 35 Judgment Returned Executed as to Donald Dee Rapier ; on 6/30/00 to serve sentence at FCI Butner, filed. (pg) [Entry date 07/17/00] [Edit date 09/25/01]

7/19/00 36 TRANSCRIPT as to Donald Dee Rapier Re: [29-1] appeal Re-Arraignment Hearing for dates of 3/6/00 before Judge Atlas , filed. Ct Reporter: E. Reed (br) [Entry date 07/20/00] [Edit date 09/25/01]

7/25/00 -- USCA Case Number as to Donald Dee Rapier Re: [29-1] appeal USCA NUMBER: 00-20514 (mhm) [Entry date 07/25/00] [Edit date 09/25/01]

8/9/00 37 ORDER to Disburse Bond as to Donald Dee Rapier (Signed by Judge Nancy F. Atlas), entered. In the Amount of $ 2,500.00 to Depositor: Ronald Rapier 6435 Ladera Drive Houston, TX 77083. Parties ntfd. (br) [Entry date 08/10/00] [Edit date 09/25/01]

9/22/00 38 TRANSCRIPT as to Donald Dee Rapier Re: [29-1] appeal Re-Arraignment & Sentencing Hearing for dates of 5/26/00 before Judge Atlas , filed. Ct Reporter: A. Traylor (br) [Entry date 09/26/00] [Edit date 09/25/01]

10/10/00 -- Certified and transmitted record on appeal consisting of 1 Vol - Original Record, 2 Vols - Transcript & 2 Sealed Instrs. (#23 & 24) to U.S. Court of Appeals as to Donald Dee Rapier:[29-1]

appeal. Circuit No. 00-20514. Parties ntfd. (bwd) [Entry date 10/10/00] [Edit date 09/25/01]

12/11/00 39 Certified copy of Clerk's Office Order by Fifth Circuit Court of Appeals as to Donald Dee Rapier ; terminating [29-1] appeal; the appeal is dismissed as of Dec 5, 2000 for want of prosecution for failure to timely file appellant's brief and record excerpts, filed. [U.S.C.A. No. 00-20514] (pj) [Entry date 12/13/00] [Edit date 09/25/01]

2/15/01 -- Record on Appeal as to Donald Dee Rapier returned from U.S. Court of Appeals: CCA No. 00-20514 Rec'd 1 vol of record, 2 vol of transcripts, 2 sealed envelopes, file reass'd fwd to fileroom. (mhm) [Entry date 02/15/01] [Edit date 09/25/01]

9/14/01 40 ORDER from U.S.C.A. reinstating [29-1] appeal as to Donald Dee Rapier; Donald Dee Rapier (1) count(s) 1, 2, filed. (USCA # 00-20514) (bwd) [Entry date 09/14/01] [Edit date 09/25/01]

10/2/01 -- Certified and transmitted record on appeal consisting of 1 Vol - Original Record, 2 Vols - Transcript & 2 Sealed Instrs. (#23 & 24) to U.S. Court of Appeals as to Donald Dee Rapier:[29-1] appeal. Circuit No. 00-20514. Parties ntfd. (bwd) [Entry date 10/02/01]

Case Flags:
APPEAL
CLOSED

END OF DOCKET: 4:00cr76-0

APPENDIX E

DOCKET SHEETS
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

General Docket
US Court of Appeals for the Fifth Circuit
Court of Appeals Docket #: 00-20514
Filed: 6/19/00
Nsuit: 0
USA v. Rapier
Appeal from: Southern District of Texas, Houston

Lower court information:

District: 0541-4 : H-00-CR-76-ALL
Ordering Judge: Nancy F Atlas, US District Judge
Court Reporter: Tape - SR, Sheila Roque
Court Reporter: Anne Traylor, U S Court Reporter
Court Reporter: Edward L Reed, US Court Reporter
Date Filed: 2/14/00
Date order/judgment: 6/6/00
Date NOA filed: 6/1/00

Fee status: Paid

Prior cases:
None
Current cases:
None

Docket as of January 24, 2002 10:34 pm Page 1

00-20514 USA v. Rapier

UNITED STATES OF AMERICA
Plaintiff - Appellee

Kathlyn Giannaula Snyder,

Assistant US Attorney
FAX 713-718-3302
713-567-9102
[COR LD NTC gvt]
US Attorney's Office
Southern District of Texas
910 Travis Street, Suite 1500
PO Box 61129
Houston, TX 77208-1129

v.

DONALD DEE RAPIER
aka
Donald D Rapier
Defendant - Appellant

Donald Dee Rapier
#88096-079
Federal Correctional
Institution
Butner - Medium
PO Box 1000
Butner, NC 27509-1000

00-20514 USA v. Rapier

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

00-20514 USA v. Rapier

6/19/00 Direct criminal case docketed. NOA filed by Appellant Donald Lee Rapier. [00-20514] (trm)

6/22/00 Transcript order received from Appellant Donald Lee Rapier for Court Reporter Anne Traylor. Date of Hearing: 05/26/00 - Sentencing. [00-20514] Ct. Reporter Acknowledgment due on 7/7/00 for Anne Traylor. (nfd)

6/22/00 Transcript order acknowledgment received from Court Reporter Anne Traylor. Estimated pages: 20 Date Financial Arrangements Made: 06/12/00 [00-20514] Ct. Reporter Acknowledgement ddl satisfied. Transcript due on 8/14/00 for Anne Traylor. Ct. Reporter Discount Date is 8/14/00 for Anne Traylor. (nfd)

7/21/00 Transcript order received from Appellant Donald Lee Rapier for Ed Reed. Date of Hearing: 03/06/00 - Rearraignment. [00-20514] Ct. Reporter Acknowledgment due on 8/7/00 for Edward L Reed. (nfd)

7/21/00 Notice received from Court Reporter Edward L Reed that transcript is awaiting final payment. [00-20514] Financial Arrangements due on 8/7/00 for Donald Lee Rapier. (nfd)

7/21/00 Dismissal notice issued to Appellant Donald Lee Rapier for failure to pay final payment w/ Court Reporter, Ed Reed. [1828855-1] DIS-1 Remedy due on 8/7/00 for Donald Lee Rapier [00-20514] (nfd)

7/21/00 Transcript order acknowledgment received from Court Reporter Edward L Reed. Date Financial Arrangements Made: 7/19/00 [00-20514] Financial Arrangements ddl satisfied. DIS-1 Remedy ddl satisfied. (ccb)

7/21/00 Transcript filed in district court by Court Reporter Edward L Reed on 7/19/00. [00-20514] Ct. Reporter Acknowledgment ddl canceled. (ccb)

8/25/00 Notice received from Court Reporter Anne Traylor that transcript is awaiting final payment. [00-20514] Financial Arrangements due on 9/12/00 for Donald Lee Rapier. (ccb)

8/28/00 Dismissal notice issued to Appellant Donald Lee Rapier for failure to make final payment w/ Court reporter, Anne Traylor. [1862259-1] DIS-1 Remedy due on 9/12/00 for Donald Lee Rapier. [00-20514] (ccb)

9/22/00 Transcript order acknowledgment received from Court Reporter Anne Traylor. Date Financial Arrangements Made: 09/22/00 [00-20514] Financial Arrangements ddl satisfied. DIS-1 Remedy ddl satisfied. (nfd)

9/27/00 Transcript filed in district court by Court Reporter Anne Traylor on 09/22/00. [00-20514] Transcript ddl satisfied. Ct. Reporter Discount Date canceled. ROA due on 10/10/00. (nfd)

10/13/00 Record on appeal filed. Vol(s) of Pleadings: 1 Vol(s) of Transcripts: 2 SEALED: 1 env (PSI, Objections & Recommendation). [00-20514] ROA ddl satisfied. (keg)

10/20/00 Briefing notice issued. [00-20514] A/Pet's Brief due on 11/29/00 for Donald Lee Rapier. (keg)

12/5/00 CLERK Order filed dismissing appeal pursuant to Local Rule 42 (Appellant's failure to file brief and record excerpts) [3074106-1] Copies to all counsel. [00-20514] (nfd)

1/23/01 Motion filed by Appellant Donald Lee Rapier to reinstate appeal [3122138-1], reset the deadline for filing the Appellant's brief [3122138-2]. Default Remedied? (Y/N): N (Awaiting record excerpts) Response/Opposition due on 2/8/01. Excess Pages? (Y/N) N [00-20514] (mcs)

2/13/01 Record on appeal returned to USDC. Volumes: 3 SEALED: 1 env - PSI. [00-20514] (tdc)

9/6/01 CLERK Order filed granting appellant's motion to reinstate case [3122138-1] Copies to all counsel. [00-20514] (pac)

9/6/01 Case reopened. [00-20514] (pac)

9/6/01 Appellant's Brief filed by Appellant Donald Lee Rapier. Copies of brief: 4 # of pages: 12. Disk Provided [Y/N]: N. Date of COS: 8/1/01 Sufficient

[Y/N]: N. Not enough copies of brief; missing certificate of interested parties & summary of argument; argument must be labeled. [00-20514] Sufficient Brief due on 9/24/01 for Donald Lee Rapier. (keg)

9/6/01 Record excerpts filed by Appellant Donald Lee Rapier # of copies: 4 Sufficient [Y/N]: N. Missing table of contents, certificate of service & tabs. [00-20514] Sufficient Record Excerpts due on 9/24/01 for Donald Lee Rapier (keg)

9/6/01 Declared moot is the motion establishing briefing notice [3122138-2] by Appellant Donald Dee Rapier [00-20514] (ams)

9/14/01 Record requested from district court. [00-20514] ROA due on 10/1/01. (pac)

10/10/01 Record on appeal released to attorney James Lee Turner for Appellee USA. Volumes: 3. [00-20514] (sdh)

10/31/01 Brief made sufficient by Appellant Donald Dee Rapier Replacement Disk Provided [Y/N]: N [00-20514] Sufficient Brief ddl satisfied. (sep)

10/31/01 Record Excerpts made sufficient by Appellant Donald Dee Rapier [00-20514] Sufficient Record Excerpts ddl satisfied. (sep)

11/13/01 Record on appeal returned to 5CCA. Volumes: 3 [00-20514] (kgc)

11/13/01 Appellee's Brief filed by Appellee USA. Copies of Brief: 7 # of pages: 28. Disk Provided [Y/N]: Y. Date of COS: 11/9/01 Sufficient [Y/N]: Y. [00-20514] E/Res's Brief ddl satisfied. Reply Brief due on 11/27/01 for Donald Dee Rapier. (kgc)

11/14/01 Appearance form filed by Kathlyn Giannaula Snyder for Appellee USA. [00-20514] (pac)

11/15/01 The attorney James Lee Turner for USA not participating in case. [00-20514] (ccb)

12/3/01 Briefing Complete. [00-20514] Reply brief ddl canceled. (jmw)

1/24/02 Opinion filed. Issue Mandate due on 2/14/02. [00-20514] (rmf)

1/24/02 Judgment entered and filed. [00-20514] (rmf)

Supreme Court, U.S.
FILED
JUL 25 2002
CLERK

No. 01-1731

In the Supreme Court of the United States

DONALD RAPIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
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Washington, D.C. 20530-0001
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12pp

QUESTIONS PRESENTED

1. Whether petitioner's convictions under 18 U.S.C. 2252A(a)(1) and 2252A(a)(5)(B) for knowingly transporting and knowingly possessing child pornography must be reversed in light of *Ashcroft* v. *Free Speech Coalition*, 122 S. Ct. 1389 (2002).

2. Whether the fact of petitioner's prior conviction, which results in a mandatory minimum term of imprisonment under the recidivist provision of 18 U.S.C. 2252A(b)(1), must be alleged in the indictment.

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In the Supreme Court of the United States

No. 01-1731

DONALD RAPIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A5) is unpublished, but the judgment is noted at 31 Fed. Appx. 836 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2002. The petition for a writ of certiorari was filed on April 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of transporting child pornography in interstate and foreign commerce, in violation of 18 U.S.C. 2252A(a)(1), and of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Pet. 10. Petitioner was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Pet. 11. He was also fined $6000. Pet. App. B8. The court of appeals affirmed. *Id.* at A3-A5.

1. On July 4, 1999, petitioner flew into Houston Intercontinental Airport from Bangkok, Thailand. Gov't C.A. Br. 4. Petitioner was referred to a secondary inspection area because in 1997, federal customs agents conducting an undercover operation had identified petitioner as a potential violator of federal child pornography laws. *Id.* at 3-4. Petitioner had a laptop computer with him and was asked about its contents. *Id.* at 4. Petitioner said he had some pictures from his trip to Bangkok and some pictures he had downloaded from the Internet. *Ibid.* Petitioner's laptop was found to contain a number of images, including a picture of petitioner performing oral sex on an Asian male of undetermined age. *Ibid.* Because the age of the subject of the picture was undetermined, the laptop computer was retained for further analysis. *Ibid.* On July 15, 1999, images of young children wearing shorts or swimsuits were found on the laptop, intermingled with pictures of adults engaged in homosexual activity. *Id.* at 4-5. On August 11, 1999, customs agents reviewed the files on petitioner's laptop and discovered sexually explicit images of children. *Id.* at 5.

2. On February 14, 2000, petitioner was charged in a two-count indictment with knowingly transporting child pornography in interstate and foreign commerce in violation of 18 U.S.C. 2252A(a)(1) (transportation count) and with knowingly possessing a computer and other material that contained an image of child pornography that had been mailed, shipped, or transported in interstate and foreign commerce in violation of 18 U.S.C. 2252A(a)(5)(B) (possession count). Pet. App. C2-C5. The indictment alleged all four definitions of "child pornography" set forth in 18 U.S.C. 2256(8). Pet. App. C3-C4.[1]

3. On March 6, 2000, without entering into an agreement with the government, petitioner pleaded guilty to both counts of the indictment. Pet. 10; 3/6/00 Tr. 3-4. Petitioner admitted to intentionally downloading images of children engaging in sexual activity

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[1] 18 U.S.C. 2256(8) defines "child pornography" as:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

and to transporting child pornography in his computer. *Id.* at 16, 20-21.

Based on the findings of the Presentence Investigation Report (PSR), the district court found petitioner's offense level to be 18 and his criminal history category to be 1. Pet. App. B11. Petitioner's Guidelines sentencing range was thus 27 to 33 months of imprisonment. *Ibid.* The PSR noted, however, that petitioner had previously pleaded guilty to indecency with a child and had been "sentenced to 10 years[']' deferred adjudication." PSR para. 36. Because petitioner had previously been convicted of an offense "relating to * * * sexual abuse * * * involving a minor," 18 U.S.C. 2252A(b)(1) mandated a minimum sentence of five years of imprisonment on the transportation count, and 18 U.S.C. 2252A(b)(2) mandated a minimum sentence of two years of imprisonment on the possession count. Accordingly, the PSR indicated that the Guidelines sentence would be 60 months of imprisonment, pursuant to Sentencing Guidelines § 5G1.1(b). PSR para. 55.

4. On May 23, 2000, the government filed a Notice of Sentence Enhancement giving petitioner notice of its intent to seek enhancements pursuant to 18 U.S.C. 2252A(b)(1) and 2252A(b)(2). On May 26, 2000, at a scheduled sentencing hearing, the district court gave petitioner an opportunity to withdraw his plea of guilty. 5/26/00 Tr. 3. Petitioner declined the offer. *Id.* at 16. The district court therefore sentenced petitioner to 60 months of imprisonment on each count, to run concurrently, and to be followed by three years of super-

vised release on each count, to run concurrently. *Id.* at 44-45, 52-53.[2]

5. The court of appeals affirmed. Pet. App. A3-A5. First, the court ruled that the district court's failure to notify petitioner at the time of his guilty plea of the mandatory minimum term of imprisonment applicable as a result of his prior conviction was harmless error because before sentencing, the district court put petitioner on notice of the mandatory minimum sentence and provided him the opportunity to withdraw his guilty plea, but he declined that opportunity. *Id.* at A3-A4. Second, the court rejected petitioner's argument that his deferred adjudication of guilt was not a prior conviction within the meaning of the enhancement provision of 18 U.S.C. 2252A(b). Pet. App. A4. Third, the court concluded that the district court had not compromised petitioner's ability to withdraw his guilty plea by ordering him to register as a sex offender with the State of Texas and to participate in a course for sexual offenders, because the district court did not order petitioner to do so. *Id.* at A4-A5. Fourth, the court of appeals rejected petitioner's complaint that the government had not provided adequate notice of its intention

---

[2] Early in the sentencing hearing, the district court recognized that the statutory minimum sentence on the possession count was two years of imprisonment, not five years of imprisonment, as set by 18 U.S.C. 2252A(b)(2); 5/26/00 Tr. 13, but when the court actually pronounced sentence, *id.* at 52-53, the court sentenced petitioner to a term of 60 months of imprisonment on each count, to run concurrently. The judgment also indicates that petitioner was sentenced to a 60-month term of imprisonment on each count, to run concurrently. Pet. App. B3-B4. Petitioner does not complain about this error with respect to the possession count and in any event, the error is harmless because the sentences run concurrently.

to seek enhancement of his sentence earlier because the government is not statutorily required to provide notice of its intention to seek an enhanced sentence under Section 2252A(b), and because the court would have been bound to enforce a statutory mandatory minimum sentence in petitioner's case even if the government had not sought an enhanced penalty. *Id.* at A5.

DISCUSSION

1. Petitioner argues for the first time (Pet. 13-14) that his convictions under 18 U.S.C. 2252A(a)(1) and 2252A(a)(5)(B) are unconstitutional under this Court's decision in *Ashcroft* v. *Free Speech Coalition*, 122 S. Ct. 1389 (2002). Because petitioner failed to raise that claim below, it may be reviewed only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997).

In *Free Speech Coalition*, this Court struck down as overbroad under the First Amendment both 18 U.S.C. 2256(8)(B), which defines "child pornography" as "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct," and 18 U.S.C. 2256(8)(D), which defines "child pornography" as any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that it depicts "a minor engaged in sexually explicit conduct." 122 S. Ct. at 1396-1406. The Court concluded that both subsections "proscribe[] a significant universe of speech that is neither obscene under *Miller* [v. *California*, 413 U.S. 15 (1973),] nor child pornography under [*New York* v.] *Ferber*[, 458 U.S. 747 (1982)]." *Id.* at 1396; see *id.* at 1405-1406.

Petitioner's indictment listed all four definitions of "child pornography" set forth in Section 2256(8), including the two invalidated by this Court in *Free Speech Coalition*. The inclusion of the two invalid provisions constitutes error that is "plain," in that it became "clear" or "obvious" after the decision in *Free Speech Coalition*. See *Johnson*, 520 U.S. at 467-468. Petitioner is not entitled to relief, however, unless he also demonstrates that the error both "affect[ed] substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002) (quoting *Johnson*, 520 U.S. at 467 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993))) (internal quotation marks omitted). The record does not indicate which of the four definitions of child pornography formed the basis for petitioner's plea of guilty. Therefore, it is unclear whether the error in petitioner's case affected his "substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 122 S. Ct. at 1785. Review of whether petitioner can make the requisite showing should be conducted by the court of appeals in the first instance. The petition for certiorari should therefore be granted, the judgment vacated, and the case remanded for further consideration in light of *Free Speech Coalition*.

2. Petitioner's second claim is that the district court violated the Constitution by imposing a mandatory minimum term of imprisonment under the recidivist provision of 18 U.S.C. 2252A(b)(1) based on a prior conviction that was not alleged in the indictment. The claim is without merit. This Court held in *Harris* v. *United States*, 122 S. Ct. 2406 (2002), that the Constitution does not require that a factor that triggers a

mandatory minimum "be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." 122 S. Ct. at 2409, 2414 (plurality opinion). Furthermore, this Court has held that a prior conviction need not be alleged in the indictment or proved beyond a reasonable doubt even if it increases the maximum length of the sentence. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000); *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998).

CONCLUSION

With respect to the first question presented the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Ashcroft* v. *Free Speech Coalition*, *supra*. In all other respects, the petition should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

MONICA S. ABRAMS
Attorney

JULY 2002